In *Powell v. Birmingham Vinegar Brewery Company*[2] Lindley L.J. said, speaking of the branching of the action for infringement from that of passing off :—

"Before there was any legislation on the subject of trade-marks it was well settled that when any one adopted a mark so closely resembling the trade-mark of the plaintiff as to be likely to be mistaken for it, the plaintiff was entitled to an injunction to restrain the use of such mark. Fraud on the public to the detriment of the plaintiff was the foundation of the right to damages at common law: per Lord Blackburn in **Singer Manufacturing Co. v. Loog**; but as long ago as 1833 it was decided in **Millington v. Fox** that intentional deceit was not essential to warrant the Court in granting an injunction. The Court will interfere to protect a plaintiff if ordinary or unwary purchasers are likely to be misled and to mistake the defendant's goods for the plaintiff's. Nothing can be more emphatic on this point than Lord Cairns's judgment in **Singer Manufacturing Co. v. Wilson.**"

when Lord Cairns said :—

"I have never known any serious doubt entertained on this subject since the case of **Millington v. Fox,** and I may refer to the observations of Lord Hatherley, then Vice-Chancellor, in the case of **Welch v. Knott**: "That the Defendant would not be entitled to use the Plaintiff's bottles in such a manner as in fact to mislead the public, although there might be no intention on his part to mislead, is clear." In **Millington v. Fox,** Lord Cottenham felt satisfied that in using the Plaintiffs' trade-marks the Defendants had no intention to mislead the public; yet inasmuch as the public were in fact misled, he held that the Plaintiffs were entitled to a perpetual injunction. It was not sufficient for the Defendants to say that they used the marks in ignorance of their being the Plaintiffs' trade-marks. How far that doctrine is capable of being reconciled with cases at law in which the scienter has been held to be essential in order to enable the Plaintiff to recover (that is, to recover damages) it is not material to consider. In this Court the rule is clear, as laid down in **Millington v. Fox.**"

In this case of *Millington v. Fox*[3] Lord Cottenham refers to the trader's property in his mark. After 1860 reports are frequent of cases brought to protect that property, which are actions for infringement of unregistered marks. In *The Leather Cloth Company Limited v. The American Leather Cloth Company Limited*[4] Lord Westbury L.C. reviews the discussion as to the basis of these actions and concludes :—

"It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them; but the word "trade-mark" is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle therefore would seem to be, that the jurisdiction of the Court in the protection given to trade-marks rests upon property, and that the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected."

Similar actions for infringement might have been brought here for the protection of unregistered marks before 1938, but they are no longer available. Such actions are designed to protect the plaintiff's property in a mark used in connection with certain goods. The passing off action on the other hand may be brought, as in *Powell v. Birmingham Vinegar Brewery Company* above, where the mark used and copied has been removed from the register of trade marks, or, as in *Barber v. Manico*[5] where the mark itself was held not to be misleading, and the defendant was restrained in respect of that properly registered mark used on similar, if not the same, goods, which mark, however, caused a name which might be misleading to be applied to defendant's goods. This action is, therefore, quite independent of the mark, which is only relevant as possibly contributing to deception. The action for infringement aims directly at protecting the property in the mark itself and is brought to stop the wrongful use of that mark, but the passing off action is for protection of the plaintiff's trade which the mark may be used to promote. The trade mark may derive some protection from a passing off action, but it might equally do so from an action of deceit or from a defence of fraud. The protection of the trade mark is not the object of either of these two latter actions.

The section under which appellants were prosecuted is a penal section, and must be strictly construed. I think it would be giving a forced, and, indeed, an improper meaning, to the definition cited to say that it includes any mark because a passing off action might protect it. In my opinion therefore the appeals must succeed and the conviction herein is quashed.

Appeals allowed.

In re TEO SOO PIAH DECEASED; TEO LYE SENG v. WEE GUAT LAN (w) AND ANOR.

[Orig. Civ. Juris. (Evans, J.) May 31, 1950]

[Singapore — Originating Summons No. 34 of 1950]

Will — Whether term "children" in will includes adopted children — Costs.

In this Originating Summons the plaintiff asked for determination of the question whether "children" in clause 2 of the will of Teo Soo Piah (deceased) includes adopted children. Clause 2 of the will read as follows: "I direct my trustees to stand possessed of all my property of whatsoever nature and wheresoever situate upon trust to keep the same until my youngest son Teo Beng Teng attains the age of thirty (30 years) and in the meantime to collect the income therefrom and after payment of the monthly allowances and for the maintenance and upkeep of my children to invest the same as hereinafter mentioned".

Held, (1) that there is nothing in the will to indicate that the word "children" has an extended meaning and therefore the word must be taken to include legitimate children only; (2) that the general rule that a legatee whose claim is dismissed is not entitled to costs must be applied in this case and therefore the costs of the application must be paid by the applicant.

Cases referred to :—

(1) *In re Yeo Soo Theam deceased* (1938) M.L.J. 2.

(2) *Re Tan Cheng Siong deceased* (1937) M.L.J. 87.

(3) *In re Lam Chee Tong deceased* (1949) M.L.J. 1.

(4) *Cartwright v. Vawdry* 5 Ves. 530.

(5) *Wilkinson v. Adam* 1 V. & B. 422 at p. 464.

ORIGINATING SUMMONS.

Philip Hoalim (*John Pillai* with him) for the plaintiff.

R. S. Boswell for the first defendant (trustee).

K. T. Ooi for the second defendant (trustee) who was also appointed to represent the beneficiaries.

Cur. Adv. Vult.

Evans, J. : — This is an Originating Summons brought by one Teo Lye Seng asking for the construction of the Will of one Teo Soo Piah who died on the 19th day of February 1942 leaving a Will dated the 17th day of July 1937.

The question to be determined is "whether the term 'children' in clause 2 of the abovementioned Will includes 'adopted children' in the said Will." The testator left three widows, two sons and one daughter and two adopted sons and three adopted daughters for all of whom he made provision in his Will. The applicant is one of the two adopted sons.

Clause 2 is as follows :—

"2. I direct my Trustees to stand possessed of all my property of whatsoever nature and wheresoever situate upon trust to keep the same until my youngest son Teo Beng Teng attains the age of thirty (30) years and in the meantime to collect the income arising therefrom and after payment of the monthly allowances and for the maintenance and upkeep of my children to invest the same as hereinafter mentioned."

Counsel for the applicant did not dispute that the word "children" in a will generally means "legitimate children", unless there be some words indicating that that word must have a more extended meaning. On the face of the Will therefore the applicant could not claim any interest under clause 2 unless he could show some special reason why the word "children" here should include himself, an adopted son. Counsel for the applicant argued that in the application of English Law to the cases of adopted children in Singapore, references in those cases to illegitimate children had generally been treated as applicable to adopted children here. He therefore referred to passages in *Jarman* (Seventh Edition, pages 1725, 1729, 1736 and 1741) regarding illegitimate children.

He went on to argue that the scheme of the testator's Will is to appoint personal representatives, to provide for distribution at an ascertained date, that is to say, when the youngest son Tan Beng Teng attains the age of thirty years and to make interim provision. The whole Will may be then divided into devises and bequests of property and the provisions for the maintenance, as Counsel would have it, of all the children until such time as distribution is made. The interpretation of these might well differ from that of bequests. An illegitimate child is entitled to maintenance and the payment of maintenance may, in fact, be enforced. It is therefore to be presumed that a testator making provision for maintenance will intend to include in the word "children" both legitimate and illegitimate children, and, in the same way, the testator in Singapore may be supposed to include in the word "children" legitimate children and adopted children who were living with him at the time of his death and for whom in fact he was providing maintenance. He cited the case of *Yeo Soo Theam deceased*[1].

That was a case decided by Mr. Justice Terrell in which after considering the provisions of that Will he said :—

"In the present case the will has to be looked at as a whole, and the conclusion which I draw is that the testator wished to provide for as great a number as possible of male descendants in the male line, and that the presumption is that among such male descendants he wished to include such descendants as were descendants merely by adoption. Such a conclusion would be in accordance with Chinese custom under which adopted sons and remoter issue are able to perform the ceremonies connected with ancestral worship as fully as natural sons and their descendants. I have not however thought it necessary to recapitulate my reasons for arriving at this conclusion as in my opinion the matter is put beyond doubt by the express terms of clause 25."

I agree however with Mr. Ooi that this case has little bearing on the present one. It was a case in which the testator defined his terms and made a 'dictionary' for himself. It is quite true that the Judge considered the matter with reference to Chinese custom, but no custom has been proved in this case, and, although it is generally accepted that in Chinese Law "adopted sons" may have rights, it is far too late to argue that those rights are recognised by the law of this colony. In *Tan Cheng Siong deceased*[2] referred to by Mr. Ooi on behalf of the beneficiaries, the general history of the matter is dealt with at some length by McElwaine, C.J. In the case of *Lam Chee Tong*[3] this rule is strictly enforced in the case of a testator who had made his Will in Chinese, and made provision for the return of some of his family to China.

At page 1726 of *Jarman* reference is made to the case of *Cartwright v. Vawdry*[4] and the observations of Eldon, Lord Chancellor in *Wilkinson and Adam*[5] which suggest some distinction such as Counsel for the

applicant sought to make between provisions as to maintenance and those as to distribution, but reference to the reports does not support that view.

Although it might be proper in some cases to treat references to illegitimate children in English Law as applicable to adopted children here, I do not think it could be properly argued that that substitution should be made in every case. The position of adopted children is not the same as that of illegitimate children more especially in respect of this matter of maintenance. An illegitimate child in England is considered as having no relatives and can look for maintenance to the putative father alone. We are not here concerned with the Chinese Law, but an adopted child under the English Act or under the local ordinance retains rights in his family of birth. There is nothing before me in this case to show that the applicant here has either obtained any right of maintenance against his adopted father, or has lost any rights of succession to his natural father. Nor can any conclusive arguments be based on a consideration of the rights of the parties apart from the Will; for the whole purpose of the Will is to vary the rights which would have existed upon an intestacy. Moreover there is in Counsel's arguments an ambiguity in the use of the word "maintenance". In considering what the Counsel describes as the testator's scheme we must have some regard to the testator's circumstances. At the time when this Will was made the youngest son Teo Beng Teng was two years of age and the applicant in this case was nineteen years of age. The date of distribution at that time was twenty-eight years distant, and there is, in my opinion, no analogy at all between an illegitimate child's right of maintenance, which is limited both as to the amount, and as to the age up to which it can be claimed, and the applicant's claim here to receive maintenance until he attains the age of forty-seven by which time as a Chinese he might have married several wives and begotten a number of children.

The applicant's argument is based on an assumption in his own favour as to what the intention of the testator was. The intention of the testator must however be deduced from the very words of the Will itself. This is an English Will carefully drawn by a Solicitor and showing throughout a recognition of the distinction between natural and adopted children and using language carefully selected to indicate which of these are intended. Wherever an adopted child is intended or included that word is used, and this is so even in clause 18 when he is dealing with remainders over and speaks of adopted child. On the other hand when he is referring to his natural sons he uses the word "son" and omits the word "natural". Reading the Will and construing it as a whole it would I think be quite wrong for me to read into clause 2 before the word "children" the words "natural or adopted" which the testator has himself inserted wherever it may be supposed intended both classes of children to be included.

The applicant's request for costs out of the estate is opposed. The trustees have never been in any doubt, and have throughout resisted his claim. The general rule is that a legatee's claim being dismissed he is not entitled to his costs though there be some ambiguity in the will requiring application to the court for its construction. I see no reason to vary that rule in applicant's favour.

The answer to the question propounded is that "children" does not include adopted children in clause 2 of the Will, and the costs of the application should be paid by the applicant.

Order accordingly.

In re JAYNA MOHAMED ISMAIL MARICAR (deceased); MOHAMED HUSSAIN MARICAR AND ANOR. v. AHAMAD BEE BINTE ISMAIL MARICAR AND 3 ORS.

[Orig Civ. Juris. (Evans, J.) July 5, 1950]

[Singapore — Originating Summons No. 226 of 1949]

Will — Period of vesting of gifts under will — Contingent or vested gifts — Whether provision is void for remoteness or uncertainty.

Clause 12 of the will of J. M. Ismail Maricar (deceased) after providing for the formation of a residuary trust fund provided that at the end of the period of twenty-one years from the death of the testator his trustees should sell or dispose of all his moveable or immoveable property and distribute the proceeds thereof "among the beneficiaries entitled thereto according to Mohammedan Law including my said adopted son Mohamed Hussain and my said adopted daughter Salmah Bee as though they were my real or natural son and daughter." Clause 14 of the said will then went on to provide:— "Provided always that if any of my child or children whether by birth or by adoption in this clause mentioned shall have died in my lifetime or before the date of distribution leaving children or a child who shall be living at the date of distribution and attain the age of twenty-one years and be solvent then and in every such case the last mentioned children or child shall take and if more than one in equal shares, the share which his or her or their parent would have taken under this provision if such parent were living at the date of distribution." In this Originating Summons the plaintiffs, who were the trustees of the will of the testator, applied (inter alia) for the determination of the questions (1) whether the gifts under clause 14 of the will to the grandchildren of the testator (being the children of such of the testator's child who has died before the date of distribution) are